

This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Can and Should We Mandate COVID-19 Vaccines for Employees?

Now that a COVID-19 vaccine is starting to be rolled out to health care workers and other vulnerable individuals, employers are starting to wonder if they can or should mandate vaccinations for employees. This article will review some legal and practical concerns for employers as they consider whether or not to mandate or encourage employees to be vaccinated and determine how to handle any information they collect about vaccine administration or confirmation. This article is intended to provide guidance to nonprofits based only on information that is available at the time of its publication. Please be aware that the landscape is continuing to develop, and it is not known at this time whether there will be any federal or state government-imposed mandates for vaccination.

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued guidance on COVID-19 vaccinations (See this [link](#) and scroll down to the section on “ADA and Vaccines”). The information shared by the EEOC on vaccinations is summarized below.

Mandatory Vaccine Programs

Employers can institute their own mandatory vaccination programs, or they can require employees to provide proof of vaccination. According to the EEOC Guidance, employers are permitted to mandate FDA-approved vaccinations without violating the Americans with Disabilities Act (“ADA”) because a vaccination itself is not a medical examination. The EEOC states that “If a vaccine is administered to an employee by an employer [or by a third party contracted to do so by the employer] for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.” EEOC Guidance, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), Updated December 16, 2020 (“December 16, 2020 EEOC Guidance”).

If an employer mandates vaccines, however, they will need to ask some health questions prior to administration of a vaccine. These pre-vaccine inquiries may raise legal issues related to the ADA or the Genetic Information Non-Discrimination Act (“GINA”) depending on what is asked. If questions may elicit information about a disability, they are disability-related inquiries regulated by the ADA. If the questions relate to family medical history or other genetic information, they may be prohibited by GINA.

If the employer administers the vaccine, it must show that any pre-screening questions that could elicit information about disabilities are “job-related and consistent with business necessity.” To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.

It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations. Employers may want to wait until such checklists have been issued by the vaccine

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manufacturers before deciding if they can administer vaccines, or if they should instead require proof of vaccination from employees to avoid making pre-vaccination inquiries that raise ADA or GINA issues.

Legally-Required Exemptions from any Mandate

Even if an employer mandates a vaccination program, the employer may not be able to enforce a vaccination mandate for employees who raise objections based on disability or religious beliefs due to the ADA and Title VII, which, in relevant part, requires accommodation of religious beliefs. Employers will, at a minimum, have to go through an analysis of whether exempting such individuals is a reasonable accommodation any time such an objection is raised.

First, the employer must determine whether the unvaccinated employee poses a direct threat at the worksite by exposing others to the virus. If an employer determines that an individual who cannot be vaccinated poses a direct threat at the worksite, then the employer must determine whether it can provide a reasonable accommodation that would reduce or eliminate the risk.

Employers may have to consider alternative work arrangements, such as teleworking or some other method to isolate the individual from others while still allowing that person to do the job, if such an arrangement is possible without undue hardship to the employer. The Centers for Disease Control (“CDC”) or Occupational Safety and Health Administration (“OSHA”) guidance may be helpful in determining steps, such as health screening, testing, social distancing, face coverings, PPE, and restrictions on gatherings, which can be taken in the workplace to maintain safety. If an accommodation that allows the employee to do the job without undue hardship cannot be identified, it will be helpful to have clear documentation of the facts and circumstances that led to the decision. If no accommodation that allows the employee to work is possible, prior to terminating employment, the EEOC encourages employers to explore options to exclude the employee from the workplace, such as available leave under laws such as the Family and Medical Leave Act, the Families First Coronavirus Response Act (if it is still in effect) or employer policies.

Consequences for Employees Refusing to be Vaccinated Who Are Not Legally Exempt

If a mandatory vaccine program is adopted, the organization needs carefully to consider what consequences it will impose on any employees who refuse to take the vaccine without a legal exemption from it. Employers would likely have to decide whether they would actually terminate employees for not receiving the “mandatory” vaccinations and make sure that any such discipline was uniformly implemented to avoid discrimination claims. Relatedly, if an employer mandates vaccinations for only certain segments of its workforce, it may need to conduct a prior review to ensure that the program—although uniformly applied to all employees in the selected job classification(s)—does not have an “adverse impact” on individuals in certain protected groups. For instance, if employees in certain segments of the workforce to be vaccinated (*e.g.*, front-line workers) happen to be disproportionately members of protected groups, and if only those employees are subject to the vaccine mandate (including potential discipline for non-compliance) such employees could potentially bring an “adverse impact” discrimination claim claiming that the mandatory vaccination program unlawfully targets protected individuals.

Voluntary Vaccination Programs

Employers are also permitted to offer a voluntary vaccination program to employees that involves either offering vaccines onsite to those who chose to take it or obtaining proof of vaccination only from those employees who are willing to provide it. If an employer offers a voluntary vaccination program, legal issues related to pre-vaccine inquiries under the ADA and GINA would not apply since answering the questions would also be voluntary. With a voluntary vaccination program, the employer would have to determine what steps, other than proof of vaccination, it may need to continue to take to protect those who chose not to vaccinate in the workplace. In this case, an employer may consider continuing health screening, testing, social distancing, face coverings, PPE, restrictions on gatherings and other safety measures in the workplace.

Managing Confidential Information

All information related to any inquiries about health or medical conditions must be maintained by an employer confidentially and in a medical file that is separate from an employee's personnel file. The EEOC does indicate, however, that proof that an employee was vaccinated, absent any other medical information, is not a disability-related inquiry, and the document can go into an employee's personnel file. If employers collect any medical or health-related information prior to administering a vaccination or in collecting vaccination information from employees, that information is subject to these restrictions and the information must be kept in a separate medical file. As a practical matter, it may be a good idea to keep all vaccine-related documents in a separate medical file in case there is actually any medical information on the document. That would prevent employers from having to scrutinize each document to ensure there is no medical information.

Is Mandating Vaccines Right for Your Workplace?

Vaccine mandates may be more appropriate for some workplaces or some kinds of jobs than others, and employers should carefully consider whether a vaccine mandate is appropriate for their workplace. For example, healthcare providers, schools and nursing homes could reasonably require mandatory vaccinations for any disease that poses a risk to the health of other co-workers or the populations they serve. In some workplaces, employers may choose to encourage vaccination, and continue to require other mitigating measures to protect the workforce (e.g., health screening, testing, social distancing, face coverings, PPE, and restrictions on gatherings).

Timing of Vaccines

Vaccines may not be readily available for some time and trying to mandate them before they are readily available may cause hardship for employees and for the organization. Furthermore, certain vaccines presently pending before the FDA for emergency use authorization contemplate a two-dose regimen over several weeks. While recent FDA scientific analysis report some protection after one dose, employers will need to consider how they will manage the time period of the vaccination schedule or the potential risks where an employee receives a first vaccine dose but is then delayed from receiving or refuses a second dose.

Payment for Time Getting a Vaccine

If a vaccine is mandated, the time spent by an employee getting the vaccine (and potentially traveling to the location where it is given) may be compensable work time under the Fair Labor Standards Act. Any mandatory program would likely require employer policies addressing such issues as who pays for the vaccines, whether employees receive paid time off to get vaccinated, how employees prove their vaccinations, whether employees would be required to re-vaccinate if vaccine protection wears off, and what happens if vaccines are not available.

Potential Liability for Employers

Employers weighing the decision of whether or not to mandate or offer vaccines should consider potential liability issues. Employers who offer certain employer-administered vaccination programs may receive some level of immunity from legal claims by employees under the Public Readiness and Emergency Preparedness (PREP) Act and their liability may also be limited by the availability of workers' compensation claims. Nevertheless, if an employer mandates a vaccine and an employee experiences side effects, the employer may be liable. For example, side effects may be seen as a work-related injury triggering reporting requirements to OSHA. Employees may file other legal claims, as well, including tort claims such as negligence, violation of workplace safety compliance standards or workplace injury/wrongful death claims. Employers should consult with the organization's liability and workers' compensation insurance carrier about potential coverage for such claims prior to instituting a mandatory vaccination policy.

On the other hand, employers should also consider the potential liability of not mandating vaccines. For instance, OSHA's "General Duty Clause" requires employers to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. Employees may assert that workplaces that do not mandate vaccines against COVID-19 violate OSHA's General Duty Clause (but other protective measures, such as social distancing and masking may be sufficient to satisfy this standard).

Another area of risk that employers should consider, if they do not mandate vaccinations, is the potential for claims from clients, customers, other employees or third parties who interact with employees in the workplace asserting that they contracted COVID-19 from an unvaccinated employee. This potential risk may increase in cases where other similar employers do mandate vaccines. However, Georgia has a statute, "The Georgia COVID-19 Pandemic Business Safety Act," that limits a business's potential liability for the transmission of COVID unless the business commits gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm. It may be difficult to provide that the lack of a vaccine mandate satisfies this high standard.

Conclusion

Like much of the response to the COVID-19 pandemic, the legal implications of a mandatory vaccination program are not yet fully known. Employers should consult with their attorney before implementing any mandatory program. Employers should also be aware of any potential efforts in state legislatures to pass laws that either mandate widespread COVID-19 vaccinations, or, conversely, expressly prohibit state-mandated vaccinations.